

Review on H1B Policy Change

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Abstract

Task:

This report is a brief review of the history of the H-1B policy. I will summarize the timeline of the H-1B policy, some notable features of the H-1B visa, and the comparison of the H-1B visa to some other similar visas.

Introduction of H-1B Visa

The H-1B visa, a cornerstone of the U.S. immigration system, has played an instrumental role in attracting global talent, particularly in specialized industries like technology, finance, engineering, and medicine. Inaugurated with the Immigration Act of 1990, the program has undergone significant changes over the years, exhibiting a dynamic response to the evolving needs of the American economy, labor market, and socio-political climate.

Initially, the H-1B visa program was designed to allow U.S. companies to employ foreign workers in specialized fields, with an annual cap of 65,000. Over the years, various acts including the American Competitiveness and Workforce Improvement Act of 1998 and the American Competitiveness in the Twenty-first Century Act of 2000 have temporarily increased this cap to address specific labor market demands, notably during the tech boom and Y2K concerns.¹

In 2004, the H-1B Visa Reform Act further refined the program, carving out an additional 20,000 visas specifically for foreign nationals who received a master's or higher degree from U.S. universities. This has, since then, been a defining feature of the H-1B visa program.

While H-1B has been a popular choice, it's also worth comparing it to other similar visa categories such as the L-1 visa for intracompany transferees and the O-1 visa for individuals with extraordinary abilities. Unlike the H-1B, these visas aren't subject to a numerical cap, and the L-1 visa, in particular, does not require a labor condition application. H-1B Visa is also unlike EB-5 Visa and TN Visa, which originated from the Free Trade Agreement between the United States and other countries. However, the H-1B is broader in its application, as it doesn't restrict applicants to intra-company transfers or those with extraordinary abilities.

The H-1B visa program has seen more policy changes in recent years. The "Buy American and Hire American" Executive Order in 2017 by the Trump administration introduced stricter rules and increased scrutiny. However, the Biden administration, since 2021, has made efforts to reverse some of these restrictions, returning to a lottery-based system and looking at wage-based selections.

The evolution of the H-1B visa program underscores the U.S.'s continued reliance on global talent to foster innovation and economic growth. It remains a vital program, although it continues to inspire debate and reform, reflecting the complex and often contentious intersection of immigration and labor policy.

Brief History of H-1B Visa

Here is a brief history of the H-1B visa program along with some policy changes up to the year 2021:

- **1990 - Immigration Act of 1990:**

The H-1B visa was created as part of the Immigration Act of 1990. The act raised the number of available temporary worker visas, including H-1B visas, which were capped at **65,000 per year**.

¹The term "Y2K" stands for "Year 2000," and it is associated with a widespread computer programming shortcut that was expected to cause extensive glitches when calendar dates changed from 1999 to 2000

- **1998 - American Competitiveness and Workforce Improvement Act:**

In 1998, in response to the tech boom, Congress temporarily raised the cap to 115,000 for 1999 and 2000, then to 107,500 for 2001, and back to 65,000 for 2002 onwards.

- **2000 - American Competitiveness in the Twenty-first Century Act:**

In 2000, the cap was raised again to 195,000 for 2001, 2002, and 2003 due to concerns about Y2K computer issues and the dot-com bubble. The cap returned to 65,000 in 2004.

- **2004 - H-1B Visa Reform Act:**

In 2004, the H-1B Visa Reform Act added an exemption of 20,000 visas for foreign nationals who received a master's or higher degree from U.S. universities. Additionally, governmental entities are exempt from the cap.

In the same year, the **H-1B1 Visa** was introduced due to the Free Trade Agreement with Singapore and Chile. The H-1B1 Visa takes a limited quota of 6800 from the H-1B quota per year, effectively reducing the cap for H-1B. The 6800 quotas are split into 1400 for Chile and 5400 for Singapore.

- **2005:**

The cap of H-1B Visa returns to 65,000. And USCIS introduces the Lottery System.

- **2015 - H-4 Dependent Visa:**

In 2015, an executive action by the Obama Administration allowed certain H-4 dependent spouses of H-1B visa holders to legally seek employment.

- **2017-2021 - Trump Administration (Effective Reduces H-1B Visa):** Under the Trump administration, changes to the H-1B program were pursued in an effort to protect American workers and reduce misuse of the program. Changes included:

- **"Buy American and Hire American" Executive Order (2017):**

1. This directed the Department of Homeland Security to issue H-1B visas to the most-skilled or highest-paid beneficiaries.
2. Increased Scrutiny: There was a substantial increase in Requests for Evidence (RFEs) and visa denials.
3. Changes to third-party worksite placements: USCIS published a policy memo stating that employers must provide detailed contracts and itineraries for employees who will work at a third-party site.

- **2020 H-1B Entry Suspension:**

On April 22, 2020, President Donald Trump signed a presidential proclamation that temporarily suspended the entry of people with non-immigrant visas, including H-1B visas. The proclamation is effective from Apr 21, 2020, to Apr 2, 2021.

- **2020 Rule on Wage Levels:**

The Department of Labor issued a rule changing the computation of prevailing wage levels, significantly raising the wages U.S. employers must pay to H-1B workers.

- **2020 Rule on "Specialty Occupations":**

USCIS narrowed the definition of "specialty occupations" that qualify for H-1B visas.

- **2021 - Biden Administration:** The Biden administration sought to reverse some of the Trump-era restrictions. Notable changes include:
 - **Withdrawal of 2020 Rules:**
The Biden administration withdrew the rule defining "specialty occupations" and revisited the rule changing the computation of prevailing wage levels.
 - **Return to the Lottery System:**
USCIS announced that it will delay the wage-based selection process for H-1B visas planned by the previous administration and return to the lottery system for FY 2022.
 - **H-4 EAD Protection:**
The Biden administration promised to protect and expand the ability of spouses of H-1B visa holders on H-4 visas to seek employment.

Notable Features of H-1B Visa

The H-1B Visa has some unique features compared to other Visa, and some of them could be exogenous variations to be used in analyzing supply shock. Here is a short list of the H-1B Visa's characteristics.

- The H-1B Visa is a dual-intent program: that is to say, the visa recipient could exhibit the intention to immigrate in the future.
- The H-1B Visa does not roll over itself: if there is a leftover quota in the current fiscal year, the unused will not move to the following fiscal year. In contrast, the H-1B1's unused slots in a given fiscal year get added to the general H-1B quota for the next fiscal year.
- H-1B visa allows for an initial three-year stay, with another three-year extension, for a total of six years before expiration. In other words, the H-1B visa has limited renewal.
- If H-1B revoked due to fraud or willful misrepresentation, the revoked quota would be added to H1B visa quota in the following fiscal year (This could be an exogenous variation in the quota in the next year)

Comparison With Other Visa Programs

H-1B1 Visa

The H-1B1 visa is a variant of the H-1B visa that is specifically for nationals of Singapore and Chile as part of the United States-Chile and United States-Singapore Free Trade Agreements. This category was created in 2003, with an annual quota of 6,800 visas: 1,400 for nationals of Chile and 5,400 for nationals of Singapore.

Here are the key features of the H-1B1 visa:

- **No Dual Intent:** Unlike H-1B visas, H-1B1 visas do not recognize "dual intent." This means H-1B1 visa holders must demonstrate that they intend to return to their home country and cannot pursue a green card while on this visa.
- **Spouse and Children:** Dependents of H-1B1 visa holders can come to the U.S. under H-4 status, similar to H-1B. However, they are not allowed to work.
- **Validity Period:** H-1B1 visas are typically granted for a one-year period, but they can be renewed indefinitely.
- **Unused Visas:** Any unused H-1B1 visas for a given fiscal year are added to the pool of available H-1B visas for the next fiscal year.

Compared to the H-1B visa, the H-1B1 is less flexible due to its lack of dual intent, meaning it is not a suitable pathway for those looking to pursue permanent residency in the United States. However, it is less competitive due to the specific quotas for Singapore and Chile, and thus could be an attractive option for citizens of these countries who are interested in temporary work in the United States in a specialty occupation.

EB-5 Investor Visa

The EB-5 visa, officially known as the Employment-Based Fifth Preference Immigrant Investor Program, was created by the U.S. Congress in 1990. The program was designed to stimulate the U.S. economy through job creation and capital investment by foreign investors. Unlike the H-1B visa, which is a non-immigrant visa, the EB-5 visa offers a pathway to permanent residency – a green card.

Here are the key features of the EB-5 visa:

- **Investment Requirement:** The primary condition for EB-5 eligibility is an investment of at least \$1.8 million in a new commercial enterprise in the United States. This amount can be reduced to \$900,000 if the investment is made in a Targeted Employment Area (TEA), which is either a rural area or an area with high unemployment.
- **Job Creation:** The investment must create or preserve at least 10 full-time jobs for qualifying U.S. workers within two years of the investor's admission to the United States as a conditional permanent resident.
- **Conditional Green Card:** Initially, investors and their immediate family members receive a conditional green card. If they fulfill the requirements of the program (primarily the job creation requirement), the conditions can be removed, making the green card permanent.
- **Direct Management Not Required:** Unlike the H-1B visa, the EB-5 visa does not require the investor to directly manage the day-to-day affairs of the business. They can be a limited partner and still satisfy the policy of the program.

Comparatively, the H-1B visa is for skilled workers in specialized occupations who are sponsored by a U.S. employer, whereas the EB-5 is for wealthy investors willing to invest a significant sum in a U.S. business venture.

While the H-1B visa is temporary and may lead to permanent residency through a separate process, the EB-5 visa offers a direct path to a green card, although the financial and job-creation requirements are significantly higher. Also, while H-1B visa holders must work in the sponsoring company and in the specified position, EB-5 visa holders have the flexibility to live and work anywhere in the U.S.

In 2019, the EB-5 program underwent significant changes that increased the minimum investment amounts and revised the standards for TEAs.

TN Status

The TN visa, part of the North American Free Trade Agreement (NAFTA) (now replaced by the United States-Mexico-Canada Agreement, or USMCA), was established in 1994. It provides a special immigration status for Canadian and Mexican professionals to work in the U.S.

Here are the key features of the TN visa:

- **Professions List:** The TN status is available only to a specific list of professions (e.g., accountants, engineers, scientists) and generally requires a bachelor's degree or appropriate professional credentials.
- **Validity Period & Extensions:** Initially, TN visas are granted for up to three years, but they can be extended indefinitely in three-year increments, without a maximum limit, as long as the individual continues to be employed in TN status.

- **No Dual Intent:** Like the H-1B1 and unlike the H-1B, the TN visa does not recognize "dual intent." This means TN visa holders must demonstrate that they intend to return to their home country and cannot pursue a green card while on this visa.

Comparatively, the H-1B visa can be for any "specialty occupation" job that requires a bachelor's degree or higher, while the TN visa only covers specific professions. TN visas are generally easier and faster to obtain than H-1B visas because they are not subject to an annual cap, and Canadian citizens can even apply directly at a U.S. port of entry. However, the lack of dual intent can make TN visas less attractive for those who hope to pursue permanent residency in the U.S.

Both H-1B and TN visas are temporary work visas, but the H-1B visa generally offers more flexibility for switching employers and pursuing a green card. TN visas, on the other hand, offer a more streamlined application process for qualifying professionals from Canada and Mexico.

E-3 Visa

The E-3 visa is a special visa program for Australian nationals to work in specialty occupations in the U.S. It was established by the United States Congress as a part of the Australia-U.S. Free Trade Agreement (AUSFTA) in 2005.

Key features of the E-3 visa include:

- **Specific to Australians:** This visa is available only to Australian nationals. An E-3 visa holder's spouse and children may also come to the U.S., and the spouse may apply for work authorization.
- **Specialty Occupations:** Similar to the H-1B, the E-3 visa is designated for "specialty occupations," or jobs that require a bachelor's degree or higher (or its equivalent in experience) in a specific field of study.
- **Validity and Extensions:** E-3 visas are initially granted for up to two years and can be renewed indefinitely, in two-year increments.
- **No Annual Cap:** Unlike the H-1B, which is subject to an annual cap of 85,000 visas, there is no cap on the total number of E-3 visas that can be issued each fiscal year.
- **Labor Condition Application (LCA):** Like the H-1B, the E-3 requires the sponsoring employer to file an LCA with the Department of Labor, attesting to fair wages and working conditions.
- **Dual Intent:** Unlike the H-1B, the E-3 visa is not considered a "dual intent" visa, meaning holders are not allowed to pursue permanent residency in the U.S. while on this visa. This can be a significant drawback compared to the H-1B visa.

In comparison to the H-1B, the E-3 visa provides a similar opportunity for skilled professionals, but is less competitive due to the lack of a visa cap. However, it's only available to Australians, and the lack of "dual intent" can make it less attractive for those who hope to pursue permanent residency in the U.S. On the other hand, the E-3 can be a faster, less expensive option for Australians seeking to work in the U.S. in a professional capacity.

E-2 Treaty Investor Visa

The E-2 Treaty Investor Visa is a non-immigrant visa that allows individuals from treaty countries - those countries with which the U.S. maintains a treaty of commerce and navigation - to reside in the U.S. when investing a significant amount of capital in a U.S. business. This visa was established to enhance economic interaction between the United States and treaty countries.

Here are the key features of the E-2 Visa:

- **Investment-Centric:** The E-2 visa is designed for individuals who are prepared to invest a substantial amount of money into a U.S. business. This contrasts with the H-1B, which is intended for skilled workers in specific occupations. The business in which the investment is made must be operating and not merely speculative or idle. However, there is no clear definition of the “substantial” amount. It generally agrees on control over 50% of the company.
- **Treaty Countries:** The E-2 visa is only available to nationals from countries with which the U.S. maintains a treaty of commerce and navigation. The list of treated countries can be founded on this [website](#). It lays out the countries and their granted dates.
- **Validity and Extensions:** E-2 visas are usually granted for two years (varies from months to five years), but extensions can be granted indefinitely in two-year increments as long as the business continues to qualify for the E-2 status.
- **No Annual Cap:** Unlike the H-1B visa, which has an annual cap of 85,000, there is no limit to the number of E-2 visas that can be issued each year.

In comparison to the H-1B visa, the E-2 visa is less about the individual’s qualifications and more about their financial investment into the U.S. economy. It doesn’t require a job offer or a specific academic degree, which distinguishes it from the H-1B visa. Also, the E-2 visa doesn’t have an annual cap, unlike the H-1B.

The main drawback is that the E-2 visa does not offer a direct path to permanent residency, which the H-1B potentially does, as the H-1B is a dual intent visa. E-2 visa holders must maintain an intention to depart the U.S. when their status expires or is terminated.